JUDICIAL RESPONSIBILITY FOR PRISONERS: THE PROCESS THAT IS DUE

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and

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We take on a burden when we put a man behind walls, and that burden is to give him a chance to change. If we deny him that, we deny his status as a human being, and to deny that is to diminish our own humanity and plant the seeds of future anguish for ourselves.¹

I. INTRODUCTION

It is agreed, among those persons who should know, that our prisons and jails are productive of little more than human suffering and recidivist criminal behavior.² Legislative reforms would be the ideal means of dealing with such problems, but legislatures are slow to act and the need for action is immediate.

It is the thesis of this article that, since it is the courts who consign persons to prisons and jails, they should also assume primary responsibility for the consequences of such confinement. Hence, prison reform can and should be initiated by the judiciary itself.

Courts, however, not only need the resources necessary to fulfill this function, they also require clearly defined legal authority in order to pursue this goal. Thus, what is presented herein should be viewed as a potential source of such authority which can be utilized by the judiciary as an initial step toward solving the problems which permeate our penal institutions. However, it must be made clear that these suggestions should not be considered to be the exclusive remedy for such overwhelming problems. And, it should be further noted that while this discussion focuses mainly upon prisons, these same considerations are equally applicable to jails. Differences between prisons and jails are essentially differences of degree and not quality. Thus, there should be no distinction in the form of remedies required.

Numerous law review articles have been written concerning

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the case law on prisoners and their rights,\textsuperscript{3} hence, this article will not review the court decisions in this area. Consideration, however, will be given to the methods utilized by the courts in determining the extent of a prisoner's rights in order to illustrate the recent trend toward a greater judicial involvement, and to point up the fact that these approaches generally cannot come to grips with the real nature of the problem.

II. TRADITIONAL JUDICIAL RELIEF—AN INFREQUENT AND INADEQUATE CURE

Historically, the earliest attacks upon mistreatment of prisoners were based upon the Constitutional guarantee against cruel and unusual punishment as set forth in the Eighth Amendment.\textsuperscript{4} Later, cases began to focus on the utilization of the Civil Rights Act as a vehicle for obtaining the needed relief.\textsuperscript{5} Yet, despite the fact that judicial recognition was readily given to a prisoner's rights to freedom of religion\textsuperscript{6} and access to the courts,\textsuperscript{7} whenever a prisoner alleged that he had been denied a federally guaranteed right by reason of his treatment within the prison, such relief was invariably denied on the traditional grounds that the judiciary would not interfere in such matters of "administrative discretion."\textsuperscript{8} To a great extent this reluctance still persists; however, a few recent decisions reflect the growing awareness of some courts of the need for judicial relief to solve the problems of our prisons.

A. CRUEL AND UNUSUAL PUNISHMENT.

An early effort to utilize the protections of the Eighth Amend-

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  \item \textsuperscript{4} U.S. CONST. amend. VIII states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
  \item \textsuperscript{5} See text at notes 31 through 36 infra.
  \item \textsuperscript{6} Cooper v. Pate, 378 U.S. 546 (1964); Pierce v. La Vallee, 293 F.2d 233 (2nd Cir. 1961).
  \item \textsuperscript{7} Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963); United States ex rel. Cleggett v. Pate, 229 F. Supp. 818 (N.D. Ill. 1964).
  \item \textsuperscript{8} As to federal prisons, see Glenn v. Ciccone, 370 F.2d 361, 363 (8th Cir. 1966); Sutton v. Settle, 302 F.2d 286, 288 (8th Cir. 1962), cert. denied, 372 U.S. 930 (1963); Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951); Holland v. Ciccone, 386 F.2d 825 (8th Cir. 1967), cert. denied, 390 U.S. 1045 (1968). As to state prisons see Douglas v. Sigler, 386 F.2d 684, 688 (8th
JUDICIAL RESPONSIBILITY FOR PRISONERS

1970

ment can be found in In re Kemmler. There the petitioner had been indicted and found guilty of murder. Pursuant to chapter 489 of the 1888 Laws of New York, the Court sentenced the petitioner to die by electrocution and ordered the warden "to pass through the body of him, the said William Kemmler, . . . a current of electricity of sufficient intensity to cause death, and that the application of such current of electricity be continued until he . . . be dead."\(^{10}\)

The petitioner claimed that such a statute constituted punishment that "was in form cruel and unusual within the inhibitions of the constitutions of the United States and of the State of New York" which had used language almost identical to the Eighth Amendment. In addition, it was claimed that this form of punishment would be a denial of "due process" as guaranteed by the Fourteenth Amendment. The Court rejected the contention that the Eighth Amendment could refer to punishments inflicted in state courts for crimes against the state and it was held that the prohibitions of that Amendment restrict only the national government. Similarly, it was found that the use of the words "due process" within the Fourteenth Amendment was not designed to interfere with the state's power to enact legislation which would promote the public welfare, so long as the legislation did not arbitrarily deprive a person of life, liberty or property. The finding of the legislature of the State of New York that such punishment was not cruel and unusual and the fact that the courts of that State had sustained that determination, led the Supreme Court to hold that due process had not been denied.

Even more significantly, it was found that the provisions of the New York Constitution prohibiting such types of punishment were intended "to operate upon the legislature of the State, to whose control the punishment of crime was almost wholly confided."\(^{11}\) Hence, by this reasoning, only acts of the legislature which result in such punishment would be reviewable, and, consequently acts of administrative officials which would punish in a cruel and unusual form could therefore not contravene the state Constitution. Such an uneven result left prisoners at the mercy of their wardens and muted their appeals for humane treatment.

In most of the early cases the Supreme Court of the United States took the position that the Eighth Amendment did not ap-

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Cir. 1967); Lee v. Tahash, 352 F.2d 970, 971 (8th Cir. 1965); and Wright v. McMann, 387 F.2d 519, 522 (2nd Cir. 1967).

10. Id. at 441.
11. Id.
12. Id. at 446.
ply to the states. In fact, Wilkesson v. Utah, expressed the belief that the term "cruel and unusual punishment" defied precision. However, that decision did go so far as to state that such forms of punishment as would constitute "torture" would be forbidden. This belief was later elaborated upon in In re Kemmler:

[1]f the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition.

In the same year, the Supreme Court in In Re Medley expressed judicial outrage at the fact that solitary confinement could be imposed at the discretion of the warden pursuant to statutory authorization. Yet, this case was decided on the issue of an ex post facto law, instead of meeting the problem directly.

Hence, the Court was slow to find that the prohibitions of the Eighth Amendment would carry over to the States. It was not until 1947 that the Court was willing to find this Amendment among the elements of guaranteed due process:

The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner.

Thus, as summarized by Mr. Justice Douglas in 1962,

The command of the Eighth Amendment, banning "cruel and unusual punishment," stems from the Bill of Rights of 1688. . . . And it is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment.

However, among these early decisions there is one case which appears to use language appropriate for our day. In Weems v. United States the court analyzed the problem of cruel and unusual

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15. 136 U.S. at 446. Quartering, use of the rack and thumbscrew have also been forbidden as forms of punishment. Chambers v. Florida, 309 U.S. 227, 237 (1940).
punishment in this manner:

Time works changes, brings into existence new conditions and purposes. Therefore a principal to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. . . .

Indeed, in applying the constitutional prohibition against cruel and unusual punishment such contemplation as to "what may be" is inevitable.

A modern decision which seems to signal this revolutionary approach is the case of *Trop v. Dulles*. There it was found that loss of citizenship for desertion from the military was a form of punishment which contravened the Eighth Amendment. The language used by the Court, which has particular significance for those concerned with prison conditions, deals with the psychological forms of unusual punishment:

There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. . . .

This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what causes his existence in his native land may be terminated.

Despite the factual distinction between the form of punishment as found in *Trop* and the conditions prevalent in a penal setting, if the same effects result from the imposition of a prison sentence, should not the rationale be equally applicable?

Unfortunately, for all the interest created, *Trop* has not instigated a detectable breakthrough in judicial concern for prison conditions, nor has it affected those who are responsible for administering the penal institutions. Nonetheless, several cases dealing with

20. *Id.* at 373 (emphasis added).
22. *Id.* at 101-02.
allegations of cruel and unusual punishment have shown a marked departure at least in "mouthing the words." Jordon v. Fitzharris was the response of a United States district court to a state prisoner's allegation that the disciplinary measure of placing a prisoner in solitary confinement violated the Eighth Amendment provisions against cruel and unusual punishment. After acknowledging the difficulty of precisely stating what constitutes cruel and unusual punishment, three guidelines were suggested in approaching the problem. Thus, if (1) the circumstances shock the general conscience or are intolerable to fundamental fairness as judged in light of developing concepts of elemental decency, or (2) if the punishment is greatly disproportionate to the offense or, (3) if the chastisement goes beyond what is necessary to achieve legitimate penal aims, then, according to this court, the existence of such illegal punishment would be evident.

In applying these approaches to the case before it, the decision in Jordon expressed shock at the primitive and debased conditions in the isolated so-called "strip cells." Furthermore, the court was dismayed at the psychological effect such conditions had on the prisoners when it noted:

In the opinion of the court, the type of confinement depicted . . . results in a slow-burning fire of resentment on the part of the inmates until it finally explode in open revolt, coupled with their violent and bizarre conduct. Requiring man or beast to live, eat and sleep under the degrading conditions pointed out in the testimony creates a condition that inevitably does violence to elemental concepts of decency.

As a result the court held that confinement of a prisoner to a cell which was six feet by eight feet, four inches, in dimension, which had no furnishings except a toilet, which was not cleaned regularly and which contained no means to enable the prisoner to clean himself constituted cruel and unusual punishment which warranted an injunction permanently restraining the prison authorities from further violating the prisoner's civil rights.

B. TRADITIONAL FORMS OF CHALLENGES

A challenge to prison administration on constitutional grounds, generally requires a writ of habeas corpus. The right of a prisoner

24. Id. at 679.
25. Id. at 680.
26. Id.
to apply for such a writ has been guaranteed by Article one, section nine, of the United States Constitution. And, the Supreme Court has further guaranteed, in *Johnson v. Avery*, that such a writ shall not be arbitrarily denied.

The effectiveness of this writ should not be overlooked. In fact, in *Jordan v. Fitzharris*, a prisoner's application to the Supreme Court of California for a writ of habeas corpus prompted that court, through an unidentified Associate Justice, to make an inquiry into certain questionable practices of the prison system which the inmate had complained of. As a result of this inquiry, the court ordered the prison officials to produce all relevant documents and memoranda bearing on the treatment within the disciplinary unit. During the course of this investigation the prison made certain radical changes and revisions in its system of treatment and produced a memorandum of same for the attention of the court. Thus, complaint alone may sometimes be sufficient to spur judicial action and effectuate changes.

However, *Jordan* also embodies the most modern form of challenge—the claim of violation of the Civil Rights Act. This Act provides in part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined not more than $1000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

And, even heavier penalties are imposed when the deprivation of such right is the result of a conspiracy of "two or more persons."

Thus, numerous suits have been brought in federal courts which are grounded upon the above statute. Although not all prisoner petitions have been found to state a cause of action, such

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27. U.S. Const. art. I, § 9: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public Safety may require it."
30. Id. at 681.
33. See, e.g., United States ex rel. Knight v. Ragen, 337 F.2d 425 (7th Cir. 1964) which found that allegations of arbitrarily being placed in solitary confinement did not state a cause of action. *Accord, Stiltner v. Rhay*, 322 F.2d 314 (9th Cir. 1963).
complaints as lack of necessary medical treatment, 34 denied of freedom of religion 35 and denial of access to the courts 36 have been found to be actionable under this statute.

The tool provided by the Civil Rights Act can be a most effective means of obtaining redress—however, courts often require a showing of “exceptional circumstances” before this Act will support a complaint which concerns prison conditions. 37 This is so because of the traditional feeling of the federal courts that “internal matters in state penitentiaries are the sole concern of the states and federal courts will not inquire concerning them.” 38

C. HANDS OFF DOCTRINE

It is therefore evident that federal courts can, and in some cases do, act in response to prisoners’ petitions. Generally, the application to a federal court requires the invocation of a federally guaranteed right, while an application to a state court can involve either a state or a federal constitutional right. Clearly, if state courts would respond adequately, federal courts would not be called upon for as much assistance as they presently provide. It would serve no purpose to review the state court decisions in this area since their response has been essentially the same as federal cases. But it should be noted that the judicial response to such petitions is inadequate, and, even when forthcoming, lacks the breadth necessary to confront the enormous problems presently existing in our nation’s prisons and jails.

The federal courts generally refuse to review state prison rules and regulations, as well as treatment of prisoners by state prison officials (except under extraordinary circumstances) on the grounds that these “internal matters” are the sole concern of the executive branch of government and the judiciary would be required to substitute its judgment for that formed by those who are experts in the field of penology. These cases also express the reluctance of the

35. Cooper v. Pate, 378 U.S. 546 (1964); Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961). Compare United States ex rel. Cleggett v. Pate, 229 F. Supp. 818 (N.D. Ill. 1964), which declares that the prisoner has no right to worship in a corporate body.
37. See United States ex rel. Knight v. Ragan, 337 F.2d 425, 426 (7th Cir. 1964) and cases cited therein.
38. Id.
federal courts to interfere in matters which they consider to be the sole concern of the states.

*Krist v. Smith*\(^\text{39}\) clearly expresses the predominate attitude of the federal courts:

However, administration of state detention facilities is a state function with which federal courts will not interfere except where paramount federal constitutional or statutory rights intervene. . . . Maintenance of discipline in prisons being an executive function, the judicial branch is loath to intrude. . . . State prison officials are vested with wide discretion in controlling prisoners and their discretion will not be interfered with unless abused or arbitrarily or capriciously exercised. . . . Only in extreme cases do federal courts intervene in conduct of a state prison or discipline of prisoners. . . . However, the rule is different where a substantive constitutional right is violated.\(^\text{40}\)

Hence, adequate review has been limited by the reluctance of the judiciary to enter into an area that is traditionally the province of the executive branch of the government. Only where a constitutional right is violated or when an unusual case is presented will the courts act. This rule has been construed in such a way that judicial response actually rests more upon the temperament of the judge than upon the mistreatment of the prisoner. The “hands off” doctrine is therefore a convenient means by which courts can escape their responsibility for overseeing the penal experience which they have meted out. As a general rule, then, it can fairly be said that courts are slow to “interfere” in the operation of prisons and jails, and serious judicial correction and supervision is therefore not probable under present methods of review.

D. PRISONERS’ RIGHTS

Underlying all of these cases is the effort to define what rights a prisoner does retain. Over the years the courts have “not hesitated to entertain petitions asserting violations of fundamental rights and, where indicated to grant relief.”\(^\text{41}\) Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.\(^\text{42}\) It is hard to argue with the need for the loss of some rights, but how do we ascertain what rights a man re-

\(^{40}\) Id. at 499 (citations omitted).
\(^{41}\) Jackson v. Bishop, 404 F.2d 571, 577 (8th Cir. 1968).
tains when he is incarcerated? As it stands today, the rules and regulations for his life are set by the prison administrators, and not by the legislatures or courts. Therein lies the crux of the problem. Since this almost absolute discretion has not been exercised to eliminate the injustices existing within the prison system, by a clear and reasonable definition of the extent of a prisoner's rights, it is for the judiciary to frame and enforce the content of these rights.

_Coffin v. Reichard_, 43 states, "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken away from him by law." Reasonable minds may differ over what rights are impliedly taken away. For example, _Davis v. Superior Court_, 45 concerned a book written by Caryl Chessman while a prisoner. The state prison warden had forbidden writing manuscripts for publication, and the court responded to this prohibition with the following statement:

Neither statute nor constitution supports the prosecution's theory that the state acquires the ownership of an incarcerated person's creativity or individuality; there are limits to the state's powers even in this specific circumstance. An odor of totalitarianism infects the concept that any product of the prisoner's mind automatically becomes the property of the state. While a free society recognizes the social need for incarceration of offenders, it claims no possession of their minds. We want no easy or invous adoption of techniques for state domination of an individual's identity, even if he is imprisoned and even if the immediate purpose of a particular prison regulation may be understandable. 46

A general statement in _Jackson v. Bishop_, 47 reflects current judicial thinking with reference to a prisoner's constitutional guarantees:

[A] prisoner of the state does not lose all his civil rights during and because of his incarceration. In particular, he continues to be protected by the due process and equal protection clause which follow him through the prison doors.

[...]

_The Eighth Amendment's guarantee against the infliction of cruel and unusual punishments seems now to have come to be regarded as directly applicable to the states through the due process clause of the Fourteenth Amendment._ 48

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43. 143 F.2d 443 (6th Cir. 1943).
44. Id. at 445.
46. Id. at 520.
47. 404 F.2d 571 (8th Cir. 1968).
48. Id. at 576 (citations omitted).
In *Jackson* the court was concerned with the use of a strap to whip prisoners. The court felt that this disciplinary method was cruel and unusual punishment, not necessarily because it inflicts pain, but because it generates hostility toward the society which permitted it. Such punishment was considered not only to be degrading to the person punished as well as to the punisher, but it was also thought that these measures frustrate the correctional and rehabilitative goals of the prison that make the prisoner’s ultimate adjustment to society more difficult.

While this rationale deals adequately with the problem of physical punishment, the courts have found it difficult to carry over and apply this principle to the numerous other degrading and outrageous conditions of prison life existing within our state prisons as well as our local jails. For example, *Thogmartin v. Moseley*, held that no prisoner has the right to request the court to “oversee, audit, regulate or direct” the specific program of rehabilitation in which the prison authorities have placed him. Furthermore, the court stated that:

> [T]he matter of determining what specific training and what specific program each prisoner should be entered upon is purely a matter of prisoner administration. This is not a matter over which the court has authority . . . .

One might be tempted to say: If the court does not keep watch, who will?

### E. Recent Trends

All of these recent decisions rest on the basic rationale set out in the early cases. Yet the courts, either in their reasoning or by their acts, seem poised to move toward even a broader scope of judicial inquiry and reform of prison life.

In *Muniz v. United States*, the United States Court of Appeals for the Second Circuit refused to allow the constriction of its jurisdiction by the conference of discretionary powers upon prison officials. As the court stated:

> [A] mere grant of authority cannot be taken as a blanket waiver of responsibility in its execution. Numerous federal agencies are vested with extensive administrative responsibilities. But it does not follow that their actions are immune from judicial review.

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50. *Id.* at 160.
51. *Id.*
52. 305 F.2d 285 (2d Cir. 1962).
53. *Id.* at 287.
Although Muniz dealt with federal review of a federal prison system, the same rationale should be applicable to the states.

However, it is evident that courts cannot really delineate the full extent of the rights which a prisoner does have. And, in future cases, it does not appear that these rights will become any more clearly defined. Since the legislatures have not seen fit to elaborate specifics of the prisoner's status, nor create guidelines concerning the purpose of incarceration, courts are left to grapple with the problem alone. The confusion and generally unsatisfactory record of coping with obvious prison failures on a case by case basis, points up the reason for the traditional "hands off" approach. Nonetheless, the problem continues to command attention, and courts are required to respond. Recent cases have indicated that even within the traditional framework, the courts can react to correct the problem.

People ex rel. Brown v. Johnston\textsuperscript{54} exhibited such a response when it stated:

The State's right to detain a prisoner is entitled to no greater application than its correlative duty to protect him from unlawful and onerous treatment . . . . mental or physical. "[R]elief other than that of absolute discharge" should be forthcoming . . . .

To implement this duty and secure the relief due the prisoner, we can and should recognize that "[c]ourts have always asserted and exercised authority which, though perhaps not expressly established by statute, is 'based upon the inherent right and duty of the courts to protect the citizen in his constitutional prerogatives and to prevent oppression or persecution.'"\textsuperscript{55}

Thus, Brown exposes a new judicial authority in prisoners' rights—the inherent power and duty of courts to go beyond the statutes in order to prevent oppression or persecution. Although this rationale would place a greater burden on the judiciary than has previously been acknowledged, it is a responsibility which must be accepted.

The Brown court found that the lower court's refusal to inquire into allegations by the petitioner that he was sane and therefore should not be transferred to a mental institution was founded upon an unwarranted reliance on the traditional rule that:

[O]ne may not by means of a writ of habeas corpus challenge imprisonment or restraint "by virtue of the final

\textsuperscript{54} 9 N.Y.2d 482, 174 N.E.2d 725 (1961).
\textsuperscript{55} Id. at 726 (citations omitted) (emphasis added).
judgment...of a competent tribunal of...criminal jurisdic-
tion..."56

In response to this well settled rule the court replied that "it seems quite obvious that any further restraint in excess of that permitted by the judgment or constitutional guarantees should be subject to inquiry."57

The language of the court in Brown, portends a greater judicial involvement and a greater breadth of judicial consideration. The decision should also encourage class actions and stimulate federal courts to investigate the whole prison setting. In addition, the Brown rationale points out the need to look behind prison regulations and administrative practices in order to determine if they are actually promoting the rehabilitation of the prisoner.

Another recent case in which the judiciary responded meaningfully to harsh prison conditions is Sostre v. Rockefeller.58 This suit was instigated by the petition of one prisoner to reform the entire prison operation. Although not formulated as a class action, the decision of the district court affected all of the inmates in the prison. The court found that the conditions of solitary confinement violated the Federal Constitutional prohibition against cruel and unusual punishment, and furthermore, that the lack of procedural due process within the prison setting was unconstitutional. In fashioning the needed relief the Court drew heavily on the Trop rationale of "evolving standards of decency that mark the progress of a ma-

56. Id.
57. Id. (emphasis added).
58. 312 F. Supp. 863 (S.D.N.Y. 1970). After the writing of this article, the United States Court of Appeals for the Second Circuit, sitting en banc, overruled the decision and order of the District Court. (No. 180—September Term, 1970—Docket No. 35038—decided February 24, 1971). The appellate court viewed the facts differently, determined that cruel and unusual punishment meant that conditions and treatment must be barbaric in nature, refused to outline procedural due process in prison hearings where solitary confinement was a possible punishment, and held that punitive damages could not be allowed. This decision typifies the general reluctance of federal courts to interfere with state prison systems. Indeed, this court reiterates the general proposition that a court cannot operate a prison system since such matters are the concern of legislative and executive prerogative and, in addition, are best run by local officials who have "sensitivity to local nuance."

It is the contention of the authors that conditions in our prisons have steadily deteriorated under legislative and executive controls and both federal and state courts will be increasingly petitioned to redress the prisoner's grievances, and, like Judge Motley in Sostre, these judges will and must attempt to respond in their judicial capacity, utilizing their constitutionally granted judicial powers in such a way which will most effectively deal with the problem.
uring society." As a result time limits on the incarceration of prisoners in solitary confinement were established and certain procedural requirements were set forth which the prison officials were required to follow thereafter. It was also determined that censorship of prisoners' letters to their attorneys should not be allowed unless the prison officials demonstrated that the lack of such a measure would undermine the discipline so necessary to such an institution. The prison program was further structured by ordering the administrators to prepare rules and regulations governing future disciplinary charges and hearings where punishment could result. And finally, to afford complete redress, the prison officials were ordered to pay regular and punitive damages to the petitioner for the unwarranted time they had caused him to spend in solitary confinement.

So sweeping is this decision in its import, that it goes far beyond responding to the particular injustices complained of. Instead, in the context of an individual action, the district court attempts to remedy the full scale of injustices which existed within the penal system.

This judicial attempt to utilize an individual complaint as a springboard from which the court can launch into a self-imposed task of prison reform, is augmented by the recent Arkansas decision of Holt v. Sarver.60

Holt was a class action by the inmates of the Cummins Farm Unit of the Arkansas State Penitentiary and the Tucker International Reformatory which alleged that the conditions and practices of the Arkansas penal system were so deplorable that confinement in such an environment amounted to cruel and unusual punishment. The defendants denied the allegations and replied that they were attempting to adequately deal with the situation within the limited funds and personnel available. Although the court, itself, acknowledged the uniqueness of this class action,61 and stated that in reality the people of Arkansas were the actual defendants,62 the trustee system, crowded conditions, lack of protection against other prisoners, poor quality of prison guards and the use of torture were all factors which the Court found to be shocking and in need of judicial relief. Thus, the forms of cruel and unusual punishment were expanded to include the concept of confinement itself:

61. Id. at 365.
62. Id.
It appears to the court, however, that the concept of "cruel and unusual punishment" is not limited to instances in which a particular inmate is subjected to a punishment directed at him as an individual. In the Court's estimation confinement itself within a given institution may amount to a cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people even though a particular inmate may never personally be subject to any disciplinary action. To put it another way, while confinement, even at hard labor and without compensation, is not considered to be necessarily cruel and unusual punishment it may be so in certain circumstances and by reason of the conditions of the confinement.

And the case contains other significant language which is aimed at the basic problems in penology—money and rehabilitation:

Since it costs money to confine convicts, more than many taxpayers realize, it would seem to be in the enlightened self-interest of all States to try to rehabilitate their convicts, as the Arkansas Legislature and Respondents have recognized. But, does the Constitution require a program of rehabilitation, or forbid the operation of a prison without such a program? Many penologists hold today that the primary purpose of prisons is rehabilitation of convicts and their restoration to society as useful citizens; those penologists hold that other aims of penal confinement, while perhaps legitimate, are of secondary importance. That has not always been the prevailing view of what penitentiaries are for, if, indeed, it is today. In years past many people have felt, and many still feel, that a criminal is sent to the penitentiary to be punished for his crimes and to protect the public from his further depredations. Under that view, while there is no objection to rehabilitation, it is not given any priority.

On assessing the chances for rehabilitation to evolve into a basic right of prisoners, the court held that despite the fact that sociological theories may develop into constitutional precepts, it was not yet prepared to say that rehabilitation is a right guaranteed by the Federal Constitution. Nonetheless, the court went on to state, "The absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a program conditions and practices exist which actually militate against reform and rehabilitation." Thus the presence or absence of a program for rehabilitation was regarded as a factor in deter-

63. Id. at 372-73 (emphasis added).
64. Id. at 379.
65. Id.
mining whether the overall conditions in the prison constituted cruel and unusual punishment.

Relief was granted by ordering the prison officials to eliminate specific enumerated conditions as soon as possible. If this was not accomplished, the court threatened to close the penal system. And, to insure these necessary changes, jurisdiction of the case was retained and the court reserved the right to regulate the schedule of reform. It was explicitly held that these reforms must be made or the prisons would be closed, and this result would obtain whether or not the state legislature took action to appropriate the funds necessary to improve these conditions.

We have come, then, to a situation of expanding judicial action. It can reasonably be assumed that increasing numbers of petitions will be placed before the courts, and that the courts will no longer feel bound by traditional rules in reviewing such complaints.

It is therefore apparent that the real responsibility for judicial review of state prison conditions rests with the state courts. It should be unnecessary for federal courts to scrutinize state institutions, when the state courts can and should do so themselves. State courts are bound by the same limitations in reviewing prisoner complaints, and are faced with the same problems in such actions as confront the federal courts. Yet, unless some action is taken, federal appellate tribunals will be increasingly called upon to inquire into the area of state prison operations.

Are the old forms of response and the present method of gaining the attention of the courts adequate? Or, is there a new approach which can be taken by the courts to remedy these problems.

III. DUE PROCESS—THE NEGLECTED APPROACH TO PENAL REFORM

There are several approaches which courts can use in dealing with penal reform that are potentially much broader in scope than the aforementioned Eighth Amendment argument. Each of these approaches can be used to support an argument grounded upon the federally guaranteed right to due process. Once a prisoner can show that the process which was "due" him has been denied, relief can readily be granted.

The source of such "process" may be found in a state constitution or statute which sets forth, even in general terms, the goals of its penal system; statutes which require a pre-sentence investiga-

66. Id. at 385.
67. See, e.g., Ind. Const. art. 1, § 18, which states, "The penal code
tion and report;\textsuperscript{68} statutes which define the factors to be considered in assigning an offender to a particular institution or in classifying him within an institution;\textsuperscript{69} statutory obligations imposed upon public officials or agencies, or even the courts themselves, to inspect jails and prisons at regular intervals and report the need for remedial action to an appropriate public body;\textsuperscript{70} and even the use of the words "correctional and reformatory" in the name of the penal institution may indicate the form of process "due" the prisoner.\textsuperscript{71} Finally, if no such express authority can be found, courts may always utilize their broad discretion in fixing the lengths of the prison sentences which they impose.

All of the above factors, implicitly if not explicitly, refer to penal practices and goals and their import can be thus summarized: There are generally accepted aims of penal laws, one of which is to reform offenders in some manner and to whatever degree possible; and courts, having the ultimate authority and responsibility for deciding to incarcerate an offender, must also make certain that the purpose which they intend such incarceration to accomplish for each individual offender \textit{will in fact occur}. In other words, a judge who sentences an offender to five years (rather than two years or ten years) to an institution labeled a "reformatory" (rather than placing him on probation or suspending his sentence) has exercised his discretion for a definite purpose, which, we can assume, conforms to generally accepted penal goals. Yet, the only way by which the judge can \textit{know} whether his purpose will be effectuated is to learn all that he can about the offender and the institution to which he will be confined. Such knowledge must be acquired prior to confinement in order for the judge to be certain of what will happen to that offender during confinement. Pre-sentence reports,

shall be founded on the principles of reformation, and not of vindictive justice"; \textit{Mont. Const.} art. III, § 24, which states, "Laws for the punishment of crime shall be founded on the principles of reformation and prevention, . . . "; \textit{N.C. Const.} art. XI, § 2, which states, "The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, . . . "; and \textit{Cal. Penal Code}, §§ 2002, 2022 (Cum. Supp. 1968).

\textsuperscript{68} \textit{E.g., Ill. Rev. Stat.}, ch. 108, § 202 (1965).
\textsuperscript{69} \textit{E.g., Colo. Rev. Stat.}, § 39-10-1 (1963).

\textsuperscript{71} \textit{See} Mueller, note 70 supra, at 80: "The very use of the word correction—when in earlier times the term punishment was preferred—seems to indicate the modern emphasis on rehabilitation of the perpetrator."
prisoner classification procedures, and jail and prison inspections and reports are different and useful ways of informing the courts so that this role may be fulfilled. These procedures must be followed as a matter of due process where required by statute.\textsuperscript{72} And, even in the absence of such statutes, it is suggested that on the basis of due process alone, a court has sufficient authority to intervene in the prison process and insure that the prisoner for whom the court has assumed responsibility is, in fact, actually being rehabilitated.\textsuperscript{73}

A. PROPOSED INITIAL STEPS

Courts understandably feel bound by traditional attitudes concerning their role in prison administration. Therefore, the most significant first step is legislative definition of penal goals,\textsuperscript{74} and provision for judicial authority in the area of sentencing and post-sentence review of offenders.\textsuperscript{75} Courts cannot be expected to carry out

\textsuperscript{72} The United States Court of Appeals for the District of Columbia has reacted favorably to this argument where treatment of persons committed involuntarily for mental illness and juvenile offenses were involved. Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967).


\textsuperscript{74} The Model Penal Code § 1.02(2) (Proposed Official Draft 1962) states:

(2) The general purposes of the provisions governing the sentencing and treatment of offenders are:

(a) to prevent the commission of offenses;
(b) to promote the correction and rehabilitation of offenders;
(c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;
(d) to give fair warning of the nature of the sentence that may be imposed on conviction of an offense;
(e) to differentiate among offenders with a view to a just individualization in their treatment;
(f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;
(g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;
(h) to integrate responsibility for the administration of the correctional system in a State Department of Correction (or other single department or agency).

See also the Nebraska Treatment & Corrections Act, \textsc{Neb. Rev. Stat. §§ 83-170 to 83-1,135} (1969 Cum. Supp.), which sets forth specific requirements regarding care and rehabilitation of prisoners, thus enunciating rehabilitation as a primary penal goal. The Act applies only to enumerated state institutions and does not include local jails.

\textsuperscript{75} See \textsc{Model Penal Code} §§ 7.01-7.09 (Proposed Official Draft 1962).
these investigative and review functions alone, and most likely cannot be expected to adequately handle such functions through utilization of present probation and prison administrative personnel. This raises the most important point that can be made about defining penal goals. Until we are willing to define our goals, we lack commitment. We view our positive efforts at penal reform as gratuitous rather than obligatory. Hence, our priorities in resource allocation remain unchallenged and unaffected.

Courts can aid the advent of the needed definition and commitment by recognizing their legal relationship to each criminal offender sentenced by them and utilizing the tools at their disposal to effectuate penal reform. This may mean that courts will regularly release or transfer prisoners because of prison or jail conditions, or order jails and prisons closed, or refuse to sentence offenders to particular penal institutions at all. If the judicial goal in imposing a sentence is not fulfilled until the offender has completed that sentence, and we assert that this is the case, then use of these methods by courts is warranted, indeed, is required if due process of law is to be afforded the criminal offender. If we spend considerable time, effort and money to assure procedural due process in convicting an offender, and yet protest that we can do no better than to incarcerate him in a penal institution which cannot effectuate our avowed goals, we have failed that offender and ourselves, for we have in a real sense taken his life without legal authority. The courts, then, must keep watch over our goals.

Life is taken away in the criminal process, not only by capital punishment, but also by the negation of human freedom and dignity. The fact that we do not exact capital punishment for all crimes indicates, quite obviously, that we do not intend to extend the negation to the point of physical death, nor, to the point of psychological death. Courts should not be solely concerned, then,

78. See Omaha World Herald, Jan. 27, 1971, at 1, col. 6 (evening ed.), concerning the threat of a Dade County Florida Judge to “release the prisoners and refuse to send to jail anyone who had not been convicted” until the county eliminated the deplorable conditions existing within the local jail.
79. Many deaths occur in jails and prisons annually, often as suicides. CLARK, CRIME IN AMERICA, 298-99 (1970). These occurrences cannot simply be passed off as results of a defective person rather than a defective system.
with the infliction of torture, conditions of obvious brutality, or even the denial of due process in ordinary prison administration practices. Courts must be involved in the active pursuit of all penal goals, which pursuit begins when a person is convicted of crime and incarcerated, and does not end until that person is discharged.